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IN THE

Supreme Court of the United States

October Term, 1974

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

v.

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR GENERAL MOTORS CORPORATION AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

Interest of General Motors Corporation 1

Argument

I. The exclusion of pregnancy from a private employer's disability benefits program does not constitute discrimination against its women employees 3

A. Under Title VII as under the Equal Protection Clause, exclusion of pregnancy from disability benefits coverage is a classification based on risk, and not discrimination based on sex 4

B. Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost factors and actuarial considerations, and not as a pretext for invidious discrimination against women 7

C. Normal pregnancy differs so markedly from disabilities resulting from sickness and accident that its exclusion from benefits coverage is justified and permissible 10

Conclusion 13

TABLE OF AUTHORITIES

Cases: PAGE

Frontiero v. Richardson, 411 U.S. 677 (1973) 4

Geduldig v. Aiello, 417 U.S. 484 (1974) 3, 4, 7, 9
Gilbert v. General Electric Co., —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), *aff'g* 375 F.Supp. 367 (E.D. Va. 1974) 5, 8
Grogg v. General Motors Corp., 73 Civ. 63 (K.T.D.) (S.D.N.Y., filed Jan. 4, 1973) 2

Reed v. Reed, 404 U.S. 71 (1971) 4

Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), *aff'g* 372 F.Supp. 1146 (W.D. Pa. 1974) 11

Constitution, Statutes and Rules:

U.S. Constitution, Fourteenth Amendment (Equal Protection Clause) 4, 5

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.* (1974) 2, 3

Supreme Court Rule 42 1

Articles and Books:

Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971) 7

PAGE

Eastman and Russell, Expectant Motherhood (5th ed. rev. 1970) 10

Grubb & McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civil Rights—Civil Liberties L. Rev. 260 (1972) 12

Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 Nw. U.L. Rev. 789 (1973) 6

Weidenbaum, Government-Mandated Price Increases: A Neglected Aspect of Inflation (American Enterprise Institute for Public Policy Research 1975) 10

Miscellaneous:

Equal Rights Amendment, H.J. Res. 208 and S.J. Res. 9 (1972) 6

H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971) 6–7

Geduldig v. Aiello, 417 U.S. 484 (1974):
Brief for Appellant 12
Brief for General Electric Company as Amicus Curiae 8, 9, 11, 12
Brief of the American Telephone and Telegraph Company as Amicus Curiae 9, 12, 13

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BRIEF FOR GENERAL MOTORS CORPORATION AS *AMICUS CURIAE*

General Motors Corporation files this brief *amicus curiae* pursuant to the written consents of the parties hereto, which are on file with the Court as required by Supreme Court Rule 42.

Interest of General Motors Corporation

General Motors Corporation ("GM"), a company engaged in the manufacture of automobiles and other products, employs about 550,000 people, over 79,000 of them women.

Since 1928, GM has provided partial income replacement benefits for its employees who are unable to work because of sickness or accident, or who are disabled because of pregnancy or resulting childbirth or complications. From the outset, the disability benefits program was effected through an insurance policy with Metropolitan Life Insurance Company, for which GM pays the premium. Under the present insurance program, negotiated through the years by collective bargaining with the unions representing GM employees, income replacement benefits for temporary disability due to sickness or accident are normally paid for up to 52 weeks, while benefits for pregnancy-related disabilities are paid for up to 6 weeks. Under other provisions of GM's comprehensive employee benefit plan, all of its employees and their eligible dependents are provided with insurance coverage for hospitalization expenses and doctors' fees, including obstetrical delivery and pre-natal and post-natal care.

GM is the defendant in a civil suit presently pending in the United States District Court for the Southern District of New York, *Grogg* v. *General Motors Corp.*, 73 Civ. 63 (K.T.D.), in which the central issue presented is similar to one raised in this appeal: The *Grogg* plaintiffs allege in substance that GM, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1974), discriminates against its female employees because of their sex by limiting income replacement benefits for pregnancy-related disabilities to 6 weeks. The case has not yet reached trial.

To the best of our knowledge, because of the prohibitive cost involved, the overwhelming majority of employers in

the United States who provide sickness and accident disability benefits to their employees either furnish no income replacement benefits for pregnancy-related disabilities, or limit such benefits to a period of not more than 6 weeks. If the Court were to hold in this case that Title VII requires such employers to include normal pregnancy among the sickness- and accident-related disabilities for which insurance coverage up to the maximum period is provided, the financial impact of the decision would be substantial to GM, and have an even greater impact on the thousands of smaller employers faced with similar liability.

ARGUMENT

I

The exclusion of pregnancy from a private employer's disability benefits insurance program does not constitute discrimination against its women employees.

We limit our argument to the proposition that the exclusion of normal pregnancy from disability insurance coverage—or, as in GM's case, limitation of pregnancy disability benefits to a maximum period of 6 weeks—does not discriminate against women as such, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1974). Such a program "does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

A. Under Title VII as under the Equal Protection Clause, exclusion of pregnancy from disability benefits coverage is a classification based on risk, and not discrimination based on sex.

It was the rationale of the *Aiello* case that exclusion of normal pregnancy from disability benefits coverage involves a classification based on risk, not one based on gender alone. That rationale, formulated with reference to a state disability insurance plan for employees of private employers, is precisely applicable in this case to a private employer's disability benefits program. Here, as in *Aiello*:

> "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.
>
> • • •
>
> "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496-97 and n.20.

As a threshold matter, therefore, the pregnancy exclusion is not a sex classification at all. It does not involve discrimination "based on gender as such," but only makes a permissible non-sexual distinction between "pregnant women" and "nonpregnant persons," *id.* at 497 n.20. We do not have here any "dissimilar treatment for men and women who are • • • similarly situated," the definition of sex discrimination formulated by the Court in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

The *Aiello* rationale comes from a case construing the Equal Protection Clause, but it is just as pertinent in a Title VII context. As Judge Widener wrote, dissenting, in *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201, 1206 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), a case like this one:

> "Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a 'lack of identity between the excluded disability and gender as such,' the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause. And since, as the Court says, the exclusion is 'merely' the removal of 'one physical condition—pregnancy—from the list of compensable disabilities,' no reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation."

The court below, however, did not accept *Aiello* as dispositive, and viewed the case as one of statutory interpretation of Title VII. Title VII contains no definition of "sex discrimination," and the court recognized the meagerness of the legislative history regarding the addition of the word "sex" to the forms of discrimination proscribed by the Act. In holding that the pregnancy exclusion was a form of sex discrimination, the court below chose, therefore, to rely on EEOC sex discrimination guidelines formulated in 1972, *after* an amendment of the Act in which Congress made no substantive changes with respect to sex discrimination.

The petitioner's brief and those of other supporting *amici* set out at length the reasons why this Court should accord no special deference to the EEOC guidelines on pregnancy benefits. We need not repeat those arguments here. We wish to note, however, that the court below ignored a substantial amount of legislative history on the Equal Rights Amendment ("ERA")—the fullest exposition we have of Congressional intent respecting sex discrimination and its relation, if any, to classifications based on single-sex characteristics—which lends strong support to the *Reed* and *Frontiero* definitions of sex discrimination and the distinction drawn by the Court in *Aiello.*

In hearings and debate concerning the ERA, its adherents said over and over again that the amendment would not interfere with state or federal power to legislate with respect to physical characteristics unique to one sex. See generally Hillman, *Sex and Employment Under the Equal Rights Amendment,* 67 Nw. U.L. Rev. 789 (1973). Fourteen members of the House Judiciary Committee who supported the original version of H.J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their separate views on H.J. Res. 208:

> "The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

In a law review article which became part of the legislative history of the ERA, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 893 n. 166 (1971), there is the following exposition of classifications based on unique sex traits:

> "[The E.R.A.] does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation, it might be said, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not * * * deny equal rights to the other sex."

B. Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost factors and actuarial considerations, and not as a pretext for invidious discrimination against women.

In *Aiello,* the Court was careful to note that distinctions involving pregnancy will be struck down upon a showing that they are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other," *Geduldig* v. *Aiello,* 417 U.S. 484, 496-97 n.20 (1974).

There was no such showing in this case. Not covert sex stereotyping, but cost factors and actuarial considerations have prompted employers to exclude pregnancy from disability benefits programs, or to impose time limitations on the payment of benefits.

Actuarial studies presented without contradiction at the trial of *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), *aff'g* 375 F.Supp. 367 (E.D. Va. 1974), show that about 40 per cent of the work force in the United States under age 65, or about 32,168,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 per cent of the plans provide 13 weeks of benefits; 50 per cent provide 26 weeks; and about 5 per cent provide coverage for 52 weeks. Only about 42.6 per cent of these plans, covering about 13,500,000 employees, provide a pregnancy benefit, and the pregnancy benefit is almost always limited to 6 weeks of coverage. Presently, moreover, the cost per unit of benefit under existing insurance for a female employee is approximately 170 per cent of that for a male employee even where no maternity benefit is provided.[1] Where a 6-week maternity benefit is provided, the cost per unit of benefit for female employees runs to 210 per cent of the male employee cost. Where full maternity coverage is provided,

1. General Electric does not provide any pregnancy disability benefits for its women employees. Nevertheless it was GE's experience that in 1970, the average cost per insured employee of total benefits paid under GE's sickness and accident insurance was $82.57 for women and $45.76 for men; in 1971, GE's average cost for women was $112.91 and $62.08 for men. Brief for General Electric Company as Amicus Curiae, at 24 n.16, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

the female cost of benefit goes up to 300-330 per cent of the male employee cost per unit. Brief for General Electric Company as Amicus Curiae, at 23-25, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

It was the testimony of GE's actuarial expert at the *Gilbert* trial that the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000. Another actuarial study put in evidence in the *Gilbert* case put the additional cost per year for a 20-week maternity benefit at $1,005 million; for a 25-week benefit at $1,313 million; and for a 30-week benefit at $1,620 million. *Id.* at 25 and n.18. In the *Aiello* case itself, 417 U.S. at 494 n.18, California estimated that the increased cost of including normal pregnancy within the risks covered by California's disability insurance system would require a 33 per cent to 36 per cent increase in the amount of benefits paid out.

Statistical data presented to and noted by the Court in *Aiello*, *id.* at 497 n.21, shows that women receive a disproportionate advantage under existing disability plans even where benefits for normal pregnancy are not provided, and that coverage of normal pregnancy would increase costs substantially, again to the disproportionate advantage of female employees. See, *e.g.*, Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 8-11, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In light of this evidence it is difficult to believe that Congress in enacting Title VII intended to require private employers to undertake a multi-million dollar employee benefit program. Furthermore, it is unlikely that employers in the

private sector could or would absorb such additional labor costs: Increases in company-paid disability insurance coverage will show up in higher prices for the company's products or services. See Weidenbaum, Government-Mandated Price Increases: A Neglected Aspect of Inflation 67-69 (American Enterprise Institute for Public Policy Research 1975).

C. Normal pregnancy differs so markedly from disabilities resulting from sickness and accident that its exclusion from benefits coverage is justified and permissible.

The very factors which make normal pregnancy disability an expensive risk to cover are those which justify excluding it from a disability insurance program intended to provide the broadest protection possible, within certain premium limits, against loss of income resulting from unexpected and perhaps calamitous illness or injury.

Pregnancy is neither an illness nor an injury, but a normal, socially desirable, biological function. A widely used handbook for pregnant women, Eastman and Russell, Expectant Motherhood (5th ed. rev. 1970), written by two distinguished obstetricians, begins:

> "Pregnancy should be a healthy, happy time. Childbearing is a natural process, the supreme physical function of womanhood; and no other event confers so much in deep-seated, abiding contentment. As a rule, the greater span of pregnancy is associated with an increased sense of vitality and well-being. Not a few of the discomforts, which only a few decades ago were regarded as invariable accompaniments of pregnancy and labor, have been tracked to their source and

> are now amenable to simple preventive measures; even that old bugbear of childbirth, the pain of labor, has been so assuaged that the majority of American mothers today experience little discomfort. Meanwhile, modern methods of care have so surrounded the whole process with multiple safeguards that the likelihood of a serious complication developing is exceedingly remote."

Pregnancy is, as a general rule, voluntary, usually happily anticipated, and subject to planning. Uncontradicted testimony by medical experts at the *Gilbert* trial established that modern contraceptive methods and the availability of safe medical abortion have virtually eliminated unwanted pregnancy and childbirth. Brief for General Electric Company as Amicus Curiae, at 16-22, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

The court below discounted petitioner's argument about the "voluntariness" of pregnancy, observing:

> "There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm." *Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F.2d 199, 206 (3d Cir. 1975).

The analogies drawn by the court are mistaken, however. No one smokes for the purpose of contracting lung cancer, nor goes skiing with the intention of breaking a leg. By contrast, pregnancy is almost always *deliberately* undertaken; it is not, as in the case of sickness and accident, unforeseen and often unforeseeable.

Pregnancy and childbirth can prompt a woman to request a leave which extends beyond the period of inability to work, and which is in significant part determined by the welfare of the child rather than the mother. Medical experts generally agree that the maximum period of disability for pregnancy and childbirth would be from approximately two weeks before delivery to four weeks after. Grubb & McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves,* 7 Harv. Civil Rights-Civil Liberties L. Rev. 260, 287-88 (1972). Nevertheless, it was California's experience in the *Aiello* case that, when the district court permitted pregnancy disability claims to be filed with the state insurance fund, the claims for disability payments averaged about 15 weeks. Brief for Appellant, at 20, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force. A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3 per cent of those who had been disabled failed to return to work, while over 48 per cent of employees who took maternity leave did not return following their leave. Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 12-13, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). It has been General Electric's experience that about 40 per cent of GE's women employees who have babies do not return to work. In 1970, of 3,548 pregnancies among GE female employees, 1,956 women returned to work and 1,592 did not return; and in 1971, there were 2,781 pregnancies, from which 1,634 women returned to work and 1,147 did not. Brief for General Electric Company as Amicus Curiae, at 26-27

n.20, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The petitioner in the case before this Court has submitted an affidavit indicating that 80 per cent of its women employees who leave work on account of maternity fail to return to active service. In the case of pregnancy, then, "temporary sickness" benefits intended to tide an employee over a period of necessary unemployment would be, a good part of the time, a unique form of severance pay.

Finally, actuarial statistics show that pregnancy claims have a frequency and duration rate substantially higher than those of any other single disability. Data prepared and presented by The American Telephone and Telegraph Company as *amicus curiae* in the *Aiello* case indicates that coverage of normal pregnancy would generate a significantly greater number of total disability days than any other category of sickness or injury, even combining the data for men and women. AT&T's survey showed that, if disability benefits had been paid for normal pregnancy by the Bell System in fiscal 1971-1972, women would have accounted for 71 per cent of all benefit days though constituting only 48 per cent of total employees eligible for benefits. Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 8-11, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

Conclusion

This Court's decision in the *Aiello* case that the exclusion of normal pregnancy is a classification based on risk, not discrimination based on sex, should be controlling here and dispositive of the issue, requiring reversal of the decision below.

Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost and actuarial considerations. The very factors which make normal pregnancy disability an expensive risk to cover—its foreseeability, frequency, and social desirability, its voluntary character, the open-endness of its duration, and the possibility of uncontrollable claim abuse—justify the exclusion of that risk from a disability insurance program intended to provide the broadest protection possible, within reasonable premium limits, against loss of income resulting from unexpected illness or injury.

Respectfully submitted,

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